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Warren B. Kittle

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EDITORIAL NOTES

THE LAW OF AMENDMENTS AS APPLIED IN WEST VIRGINIA.

I.

Amendment of the Writ.—It has been said that a summons, commencing an action in a court of record cannot be amended in any substantial particular, unless statutes of amendment authorize it, and that although by the common law some writs were amendable, the power of amendment only existed as to slight and formal defects.[1] This applied especially to original writs issuing out of the court of chancery and returnable into the common law courts, of which we have none. Our summons corresponds to the common law writs, issuing out of the law courts, which are amendable as to the name of the defendant, the date of the teste, and other mere irregularities easily correctible, without prejudice.[2] The statute does not permit the plaintiff to amend a writ so as to make new parties plaintiff.[3]

What Writs Amendable.—As a rule all voidable process may be perfected by amendment; but void process cannot be. A void process has no validity, and nothing exists by which it can be amended; "the breath of life cannot be infused into it, and it is a nullity".[4] Thus, a summons that is returnable more than ninety days from its date is void, and cannot be amended.[5] And a writ or process returnable to a day which is not in law a return day is void.[6] Thus, an attachment made returnable more than ninety days after its date, when the statute, Code chapter 106, section 5, requires attachments to be returned at the next term of the court, and which skips a terms, and is returnable to the second term after its issuance, is void.[7]

But process tested July 6, 1926, and made returnable "on the first Tuesday in the month of July, 1926, next", Tuesday, July 6,

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1 Fisher *v.* Crowley, 57 W. Va. 312, 50 S. E. 422 (1905).

2 *Idem*, 312, 317.

3 Phillips *v.* Deveney, 47 W. Va. 653, 35 S. E. 821 (1900); Agee *v.* Virginian Ry. Co., 98 W. Va. 109, 115, 126 S. E. 564 (1925); *Code*, ch. 125, §15.

4 Durham *v.* Heaton, 28 Ill. 264 (1862); Kyles *v.* Ford, 2 Rand. 1 (1823); Code *v.* Thompson, 39 W. Va. 67, 19 S. E. 548 (1894); 32 *Cyc.* 551, *L. Enc. Pl. & Pr.* 658.

5 Town of Point Pleasant *v.* Greenlee, 63 W. Va. 207, 211, 60 S. E. 601 (1907); Fisher *v.* Crowley, *supra*, n. 1.

6 Kyles *v.* Ford, *supra*, n. 4.

7 Cody *v.* Thompson, *supra*, n. 4; Fisher *v.* Crowley, *supra*, n. 1.

being a rule day, was held neither void nor voidable.[8] This is because a summons commencing a civil action may be issued on, be returnable to, and be served on, a rule day.[9] Even if process were issued on, returnable to, and executed on the last rule day in a month, it would deprive the defendant of no rights, because he would have until the next rules to plead, even in abatement, under our statute.[10] As the conditional judgment would be entered at the rules at which the declaration is filed, in default of appearance, this statute allows a plea in abatement "at the succeeding rules", and even then the statute applies only to pleas to the jurisdiction, and not to other pleas in abatement.[11]

Likewise, it has been held, that a summons otherwise regular would not be absolutely null and void, because its date is blank and it is not signed by the clerk, but may be amended.[12]

Amendments by the Clerk.—Before the writ is delivered to be executed the process is in control of the clerk, and he may change it and fill up blanks so as to perfect the same.[13] He may correct any clerical errors, and supply omissions, if done at any time before the writ is served.[14] But after the service of the writ he is not authorized to change the same.[15] In the case last cited it was held error for the clerk to change the return day of the writ after the process had been served.

Amendments by leave of the Court.—After process has been served, an amendment thereof cannot be made, as a rule, wthout leave of the court.[16] Application for leave to amend a summons should be made upon notice where there has been a general appearance; or, by the more general practice, a motion is made in court in presence of the defendant to amend the summons.[17]

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8 Venable *v.* Gulf Taxi Line, 105 W. Va. ,141 S. E. 622 (1928).

9 Spragins *v.* W. Va., etc., Ry. Co., 35 W. Va. 139, 13 S. E. 45 (1891); Foley *v.* Ruley, 43 W. Va. 513.

10 *Code*, ch. 125, §16.

11 Taylor *v.* Virginia, etc., Coal Co., 78 W. Va. 455, 88 S. E. 1070 (1916).

12 Ambler *v.* Leach, 15 W. Va. 677 (1879); Laidley's Adm'r *v.* Bright's Adm'r, 17 W. Va. 790 (1881); Miller *v.* Zeigler, 44 W. Va. 486, 29 S. E. 981 (1898); Norton *v.* Dow, 10 Ill. 459 (1849); Austin *v.* Lamar Fire Ins. Co., 108 Mass. 338 (1871); 1 *Enc. Pl. & Pr.* 669. *Contra*, Fisher *v.* Crowley, *supra*, n. 1, 316.

13 *Judicial Writs*, 82, 32 Cyc. 444.

14 *Code*, ch. 124, 5.

15 Ketterman *v.* Dry Fork R. R. Co., 48 W. Va. 606, 608, 37 S. E. 683 (1900).

16 1 *Enc. Pl. & Prac.* 671; 32 *Cyc.* 536; *Alderson, Judicial Writs*, 71; *supra*, n. 15.

17 1 *Enc. Pl. & Pr.* 672.

It may be stated as a general rule that any defect or omission of a formal character which would be waived or remedied by a general appearance, or answer upon the merits, may be treated as matter which can be remedied by amendment.[18]

Thus, a summons in assumpsit, served on the defendant, may be amended by virtue of the statute, so as to correct a variance between it and a declaration in trespass.[19] So, an amendment was allowed to the summons by striking out the words, "in assumpsit", and changing the damages from five hundred dollars to one thousand dollars so as to correspond with the declaration.[20] So, when an action of assumpsit has been remanded to Rules, with leave to file an amended declaration, and summons issues requiring the defendant to appear and answer the declaration, and an amended declaration is filed, the court may permit the plaintiff to amend the writ at the bar of the court by inserting "amended declaration" in place of the word "declaration" without new process.[21]

Also the summons may be amended so as to conform to the declaration as amended.[22] And an execution, though issued for a larger sum than that expressed by the judgment may be amended, by it, either by inspection, or by the sworn testimony of the keeper of the records to show its identity.[23] And our statute authorizes the amendment of a summons, which is defective in designating a corporate defendant, as a corporation.[24]

Amendments of the writ have been allowed to correct the names of the parties, both plaintiff and defendant;[25] or to specify or alter the capacity in which they sue or are sued.[26] And generally, parties unnecessarily and improperly made such, and having no interest in the suit, may be stricken out, when the cause or nature of the action is not affected, and no injury can accrue to the defend-

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18 ALDERSON, JUDICIAL WRITS, 14 *et seq.*, 72, 74, 75.

19 Ryan *v.* Piney Coal Co., 72 W. Va. 630, 78 S. E. 789 (1913).

20 Barnes *v.* City of Grafton, 61 W. Va. 408, 56 S. E. 608 (1907); *supra*, n. 19.

21 Brown *v.* Cooke, 77 W. Va. 356, 87 S. E. 454 (1915).

22 O'Neal *v.* Pocahontas Trans. Co., 99 W. Va. 456, 129 S. E. 478 (1925).

23 Dorham *v.* Heaton, 28 Ill. 264 (1862).

24 Snyder *v.* Philadelphia Co., 54 W. Va. 149, 46 S. E. 366 (1903).

25 Bank *v.* Distilling Co., 41 W. Va. 530, 23 S. E. 792 (1895); Hoffman *v.* Dickenson, 31 W. Va. 142, 6 S. E. 53 (1888); Corrick *v.* W. M. Ry. Co., 79 W. Va. 592, 91 S. E. 458 (1917); Kingham Mills *v.* Fumer, 89 W. Va. 511, 109 S. E. 600 (1921); Duty *v.* C. & O. Ry., 70 W. Va. 14, 73 S. E. 33 (1912).

26 Drew *v.* Farnsworth, 186 Mass. 365, 71 N. E. 783 (1904); 32 *Cyc.* 532; 1 *Enc. Pl. & Pr.* 665; Randolph *v.* Barrett, 16 Pet. 138 (1842).

ant. Thus, where the wife is improperly made defendant in an action on contract during coverture;[26A] or if several are sued in covenant, and, on oyer had, it appears that some of them never became parties to the deed, the names improperly inserted in the process may be stricken out. But if such amendment will change the ground of action, or have the effect of constituting a different party to the record, it will not be allowed. Thus, where the suit was against two as partners, it was proposed to amend by erasing the name of one, and so making it a suit against the other in his individual or several capacity, it was not allowed.[26B] Of course, one defendant cannot be substituted for another, without the consent of such other party;[27] and it is said that if a writ is not directed to any officer or is directed to a wrong officer, it may be amended.[28] So the summons may be amended by stating, reducing or increasing the amount of damages.[29]

A variance between the summons and the declaration may be amended by virtue of chapter 125, section 15 of the Code.[30]

Amendment of the Return.—When process has been returned to, and filed in the court, the return on it becomes a matter of record,

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[26A] Colcord *v.* Swan, 7 Mass. 291 (1811); Parsons *v.* Plaister, 13 Mass. 189 (1816); Whitbeck *v.* Cook, 15 Johns. (N. Y.) 483 (1818).

[26B] Peck *v.* Sill, 3 Conn. 157 (1819); 2 GREENL. Ev. 11a (15th ed.); 21 R. C. L. 1328; see 32 CYC. 532.

[27] Phillips *v.* Deveney, *supra*, n. 3, 655; Fisher *v.* Crowley, *supra*, n. 1; Agee *v.* Ry. Co., *supra*, n. 3.

[28] 32 CYC. and cit.; 1 ENC. PL. & PR. 662.

[29] Graves *v.* N. Y., etc., Ry. Co., 160 Mass. 402, 35 N. E. 851 (1894); 32 CYC. 534; 1 ENC. PL. & PR. 587; Barnes *v.* City of Grafton, *supra*, n. 20.

[30] Shaffer *v.* Security Trust Co., 82 W. Va. 618, 97 S. E. 290 (1918); Ryan *v.* Piney Coal & Coke Co., *supra*, n. 19; Barnes *v.* Grafton, *supra*, n. 20. Advantage can be taken of a variance between the writ and the declaration only by a plea in abatement. CODE, ch. 125, §15; Bank of Pineville *v.* Sanders, 77 W. Va. 716, 88 S. E. 187 (1916); Anderson *v.* Lewis, 64 W. Va. 297, 61 S. E. 160 (1908); Wilson *v.* Ritz, 96 W. Va. 397, 123 S. E. 63 (1924). In England, no advantage can be taken of a variance between the writ and the declaration. 1 CHIT. PL. (6th ed.) 278. *Id.* 446, 466 (16th ed.); ST. PL. (TYLER ED.) 369. And such should be the rule with us, for, if the summons gives sufficient notice to bring the defendant into court, it has fulfilled its office. Bank of the Valley *v.* Berkley, 3 W. Va. 386 (1869); Mahony *v.* Kephart, etc., 15 W. Va. 609 (1879). Unlike the ancient English writ, the summons does not confer permission or authority on the courts to try the case. 3 BL. COM. 273, 1 CHIT. PL. (6th ed.) 107, but the power of the court is derived from the constitution and laws, irrespective of any permission from any other source. W. VA. CONST., Art. III, §17; Smith *v.* Smith, 81 W. Va. 761, 764, 95 S. E. 199 (1918); Shelton *v.* Snyder, 126 Va. 625, 102 S. E. 83 (1920); Barnes *v.* America Fertilizer Co., 144 Va. 692, 130 S. E. 902 (1925). Hence, the object of a summons is to notify the defendant of the pendency of an action, giving time and place.

and cannot be amended except by leave of the Court.[31] This permission is usually granted upon proper application made in the cause in which the writ of summons issued. It is not granted as a matter of course, but only in the furtherance of justice and in the exercise of an enlightened discretion after notice to the opposite party; and the court may hear evidence as to the truth of the facts upon which the amendment is asked.[32] The proper application being made, the courts allow amendments with freedom; they have always been liberal in allowing officers to amend their returns, according to the truth, when a casual and honest mistake has occurred.[33] And these amendments will be permitted on all process, whether original, mesne or final, though a suit thereon has been pending, and though the officer who made the return has gone out of office or is dead.[34] Thus, a sheriff has been permitted by the court to amend his return after the lapse of seven years from its date;[35] and so, after a lapse of thirteen years, the sheriff was allowed to amend the return.[36] Either the sheriff or his deputy will be permitted to amend his return of process.[37]

At What Time Allowed.—An officer will be permitted to amend a defective return on a process at any time, even though a suit or motion founded on the original return be then pending, and even though the proposed amendment be inconsistent with the original return, and takes away the foundation of the suit or motion. And the rule permitting amendment, if necessary, should be more liberal in regard to the return of a notice of motion for judgment than to a return on a process.[38] And pending an appeal in the Supreme Court the return of process commencing a suit may be amended in a lower court, upon proper application and notice to the opposite party; and if the amendment is allowed, such fact

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31 Park Land & Imp. Co. *v.* Lane, 106 Va. 304, 55 S. E. 690 (1906); Goolsby *v.* St. John, 25 Gratt. 146, 160 (1874).

32 Shen. Val. Ry. Co. *v.* Ashby, 86 Va. 232, 9 S. E. 1003 (1889); Park Land Imp. Co. *v.* Lane, *supra*, n. 31.

33 Hopkins *v.* B. & O. R. R. Co., 42 W. Va. 535, 26 S. E. 187 (1896); Shen. Val. Ry. Co. *v.* Ashby, *supra*, n. 32; McClure-Mabie Lbr. Co. *v.* Brooks, 46 W. Va. 732, 34 S. E. 921 (1899).

34 Stots *v.* Collins, 83 Va. 423, 2 S. E. 73 (1887); Shen. Val. Ry. Co. *v.* Ashby, *supra*, n. 32; Hoppes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 320 (1897); State *v.* Martin, 38 W. Va. 568, 18 S. E. 748 (1893).

35 Rucker *v.* Harrison, 6 Munf. 181 (1818).

36 Railroad Co. *v.* Ashby, *supra*, n. 32.

37 State *v.* Martin, *supra*, n. 34; Stone *v.* Wilson, 10 Gratt. 520 (1853); Wadsworth *v.* Miller, 4 Gratt. 99 (1847).

38 Alsop Motor Corp. *v.* Barker, 138 Va. 598, 123 S. E. 350 (1924).

may be shown to the Supreme Court by a supplemental record;[39] and when the amendment is thus made, if it appears that it is properly made, and that the defective service is thereby cured, it will relate back to the original time of service, and will obviate the error in that regard.[40]

It is proper on the hearing of a motion to reverse a judgment by default for a defective return of the summons in the action, to allow the sheriff to amend his return, and then overrule the motion to reverse, if the amended return be good.[41] So an insufficient return of service on the summons to answer an action may be amended, on motion to quash an execution issued on a default judgment therein, notwithstanding the defendant appeared specially in the action, and unsuccessfully sought to quash the return.[42] But the sheriff has no right to amend the process itself; he can only amend his return, and if he does amend the process, the amended process or changed notice is a nullity.[43]

II.

Amending the Pleadings.—In the beginning all pleadings were oral, and took place in court before the judges, and it was not until about the middle of the fourteenth century that pleadings were required to be in writing.[44] During these mutual altercations the judges allowed the pleadings to be amended or changed, with great freedom;[45] and it has been said that so far as the power to amend is concerned, the statutes of amendments are only declaratory of the common law.[46]

> "A trial court not only has the authority, but it is its duty, to permit an amendment to be made to a declaration at any time before trial, if substantial justice will be promoted thereby, and such amendment does not introduce a new cause of action."[47]

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39 Gauley Land Assn. *v.* Spies, 61 W. Va. 19, 55 S. E. 903 (1907).
40 Anderson *v.* Doolittle, 38 W. Va. 633, 18 S. E. 726 (1893); Capehart *v.* Cunningham, 12 W. Va. 750 (1878).
42 Spencer *v.* Richard, *supra*, n. 40.
43 White *v.* Snydenstricker, 6 W. Va. 46 (1873).
44 Pickett *v.* Claiborne, 4 Call 99, 105 (1787); ANDREW STEPHENS PLEADING 147; WILLS GOULD PLEADING 180 n.
45 SHIPMAN, COM. L. PLDG. (3rd ed.) 294; ANDREW STEPHENS PLEADING 211.
46 1 Enc. Pl. & Pr. 509; Christal *v.* Kelley, 88 N. Y. 285 (1882).
47 Fire Ins. Co. *v.* Power Co., 81 W. Va. 298, 94 S. E. 372 (1917).

> "The circuit courts of this state, in the exercise of their general common law jurisdiction in the absence of any statute prohibiting them from so doing, independently of any statute authorizing them to do so, may in their discretion, permit the pleadings to be amended at any time before a verdict found, whenever justice will be promoted thereby."[48]

If it appears that such amendment surprises the defendant and makes necessary the preparation of additional evidence to meet the matters thus introduced, the court should, upon defendant's motion, continue the case, in order to give such opportunity.[49] But the amendment of a pleading at the trial, to make the allegations correspond with the proof, allowed under section 8, chapter 131 of the Code, does not give the opposite party any absolute right to continue the case. He can have such contiuance only for cause made apparent by the character of the amendment or otherwise shown.[50] Nor, where a pleading is amended, is the opposite party entitled to a continuance, unless it can be shown that such amendment creates a genuine surprise, or that it is necessary to procure further evidence, to meet the amendment. In other words, a continuance cannot be had as a matter of course simply because an amendment has been made to the pleading. Reasonable cause for such continuance must be shown.[51]

Whether Leave of the Court Required.—Under chapter 125, section 12 of the Code, amendments may be had according to the circumstances of the particular case, with or without leave of the court. The first part of section 12 gives the plaintiff the right to amend his declaration or bill at any time before the appearance of the defendant, and this, without leave of the court, or after such appearance, if substantial justice will be promoted thereby, and this, of course, with leave of the court.[52] In other words, after an appearance you must have leave of the court to amend in court, because it is necessary for a court to say whether "substantial justice will be promoted" by such an amendment. But, notwithstanding there has been appearance our court has held,

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48 Travis *v.* Ins. Co., 28 W. Va. 583 (1886).

49 *Supra*, n. 47; *supra*, n. 48.

50 Koen *v.* Brewing Co., 69 W. Va. 94, 70 S. E. 1098 (1911); Adams *v.* Adams, 79 W. Va. 546, 92 S. E. 463 (1917); Morrison *v.* Coal Co., 88 W. Va. 158, 106 S. E. 448 (1921).

51 CODE, ch. 125, §12; Williamson *v.* Hines, 89 W. Va. 268, 109 S. E. 237 (1921).

52 Phelps & Pound *v.* Smith & Co., 16 W. Va. 522 (1880).

> "After the appearance of the defendant, the court should be liberal in allowing such amendments to the declaration, as tend to promote the fair trial and determination of the subject matter of controversy, upon which the action was originally based."[53]

This was the rule under the statute as it stood before 1911. In that year the law was amended, and by the last clause the plaintiff was given the right, at any time before or after the appearance of the defendant, in vacation of the court wherein the suit is pending, to file in the clerk's office, an amended declaration, bill, supplemental bill, or bill of review in such suit, whereupon the clerk shall issue a summons against the defendant requiring him to plead or answer such amended declaration or bill. Plainly, this gives the plaintiff a right at any time before trial, notwithstanding an appearance, to file an amended declaration or bill in the clerk's office, or other pleading, upon which it becomes the duty of the clerk to issue process against the defendant. It requires no leave of the court to make such amendment under the statute. If the amendments were made in court, and after appearance, then leave of the court would be required. But being made out of court no such leave is required. Now, it always has been a rule that an amendment cannot introduce a new cause of action.[54] And it is because a party is not allowed to introduce a new cause of action by amendment that the statute, chapter 125, section 12 adds,

> "But if the court shall be of opinion that the same was improperly filed, it shall dismiss such declaration or bill at the cost of the plaintiff."

Of course, no improper amendment can be made, or improper pleading filed.

It is settled law, that the date of the summons is the date upon which an action is commenced, and from that moment the suit is supposed to be pending in the court. Certainly, a cause is pending when the summons has been served and the declaration filed. Under the statute, chapter 125, section 12, a plaintiff has the right to file an amended declaration in the clerk's office, after the cause is pending, without leave of the court, and the clerk must issue process thereon. Then, when the parties appear in court the

[53] Snyder *v.* Harper, 24 W. Va. 206 (1884).
[54] Snyder *v.* Harper, *supra*; Fire Ins. Co. *v.* Power Co., *supra*, n. 47.

defendant can demur to the amended declaration, if it is not good in law, or move the court to reject the same, if it introduces a new cause of action, or is otherwise improper.[55] Of course, an amended declaration which introduces a new cause of action, must be objected to, and the filing thereof objected to, because such defect cannot be considered on demurrer.[56] A demurrer only goes to the face of the declaration and tests the legality of that specific declaration, and would not notice or include the allegations in the former declaration.[57]

Meaning of New Cause of Action.—The expression, "new cause of action" when used on the subject of amendment, is generally understood, as intending nothing more than a new right or claim arising out of the same transaction. If it were not so—that is, if the new cause of action was one arising out of a wholly different transaction from that laid in the complaint—then it would constitute what we have sometimes designated as an entire new cause of action, and one which could not be introduced into the declaration by amendment, if objected to. Identity of transaction is therefore the basis for the introduction by way of amendment of counts on new claims or rights arising out of the same.[58] And it has been said that in determining whether an amendment to a declaration asserts new matter for a new claim, and relates back to the commencement of the suit, so as to cut off the plea of the statute of limitations, the true test is whether the matter set up in the amendment amounts to a departure in after pleading, and if it does, the amendment cannot thus relate back.[59]

So long as the form of action is not changed, and the court can see that the identity of the originally intended cause of action is preserved, the particular allegations of the declaration may be changed by amendment in order to cure imperfection and mistakes in the matter of stating plaintiff's cause.[60] Thus, it has been held that if an amended declaration asserts rights or claims arising out of the same transaction, act, agreement, or obligation as that upon

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[55] McMechen *v.* B. & O. R. R. Co., 90 W. Va. 21, 110 S. E. 474 (1922).

[56] *Supra.*

[57] See Findley *v.* Railroad, 76 W. Va. 747, 87 S. E. 198 (1915); Nankin *v.* Jones, 68 W. Va. 422, 69 S. E. 981 (1911); Roberts *v.* Gas Co., 84 W. Va. 368, 99 S. E. 549 (1919).

[58] Nelson *v.* First Nat. Bank, 139 Ala. 578, 36 So. 707, 101 Am. St. Rep. 52 (1904).

[59] *Idem.*

[60] Hanson *v.* Blake, 63 W. Va. 560, 60 S. E. 589 (1908); Elkhorn Sand & Sup. Co. *v.* Algonquin Coal Co., 103 W. Va. 110, 136 S. E. 783 (1927); Clarke *v.* O. Ry. Co., 39 W. Va. 732, 20 S. E. 696 (1894).

which the original declaration is founded, it will not be regarded as for a new cause of action, however great may be the difference in the form of liability in the two declarations. A new case is not made by charging in the original declaration a transaction as a lawful act done negligently, and charging the same transaction in an amended declaration as an unlawful act. The two declarations are regarded as variations in the form of liability to meet the varying phases of the evidence as it may appear.[61] The true criterion is said to be, whether the alteration or proposed amendment is a new and different matter—another cause of controversy; or whether it is the same contract or injury, and a mere permission to allege it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with his proofs, and the merits of his case.[62]

Examples.—As a few instances in which amendments have been allowed to the declaration we cite: In ejectment the declaration may be amended by the insertion of a new count in the name of a new plaintiff, and the action, as to such plaintiffs, will be deemed to have commenced at the time of the service of the new count, with notice on the defendants; or if it be not served, then at the time of their pleading to or other recognition of the count.[63] In an action by a land owner against a railroad company for failure to build fences, farm crossings and cattle guards the declaration may be amended by charging failures to build them at other points than those specified in the original declaration without violating the rule against the introduction of a new cause of action.[64] Amending a declaration in assumpsit, embracing the common counts only, by adding a special count applicable to a particular item in the bill of particulars which is also provable under some one of the common counts, is not a departure from the original cause of action, if the amount of damages claimed in both the original and amended declarations are the same.[65]

And where a declaration is for damages resulting from the negligent doing of a lawful act, an amendment, after an appearance, claiming that the damages were caused by the committing of the same act, but alleging it to be unlawful, was not considered the setting up of a new cause of action, or as bringing into the case

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61 New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300 (1902).
62 Cassell *v.* Cooke, 8 S. & R. (Pa.) 287 (1845).
63 Strader *v.* Goff, 6 W. Va. 257 (1873).
64 Clark *v.* Ohio River Ry., *supra*, n. 60.
65 Nankin *v.* Jones, *supra*, n. 57.

a substantive cause of action different from that originally declared on.[66]

In a late case, on the trial it appeared that plaintiff's claim consisted of the price of three cars of sand sold and delivered to the defendant, $75.45, and prepaid freight on the same, $263.29. The court permitted the plaintiff to amend its notice by adding thereto the words: "And for prepaid freight on your order and request", which was considered as introducing no new cause of action.[67] It is also permissible to amend a declaration by striking out one of the counts, even where one of the counts is in contract, and the other in tort.[68] So, a declaration may be amended, during the trial and before verdict, by filling up blanks, if substantial justice will thereby be promoted.[69]

The foregoing cases show that an amended declaration is no departure from the original, unless it introduces into the case a new substantive cause of action, different from that declared upon. Allegations may be changed, and others added; but they must relate to the same cause of action.[70] Conversely, a new cause of action cannot be introduced by amendment, though the amendment be such as would in another count have been properly inserted in the original declaration; and the new cause of action was such, as could, if the plaintiff had so chosen, been united in the same suit with the original cause of action actually sued upon. Thus, a declaration for assault and battery cannot be amended after the appearance of the defendant, against his protest, by the addition of a count for taking and carrying away goods and chattels.[71]

As to whether an amendment introduces a new cause of action is one of considerable difficulty, and the Virginia court has said, "It may be difficult under the adjudications to state what is to be regarded as a new case within the meaning of the rule."[72] And it is stated that "the general tendency is in the direction of increasing liberality in respect of allowing amendments, thereby enlarging the flexibility of judicial procedure to the end that substantial

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66 New River Mineral Co. *v.* Painter, *supra*, n. 61.
67 Elkhorn Sand & Sup. Co. *v.* Algonquin Coal Co., *supra*, n. 60.
68 O'Neal *v.* Trans. Co., *supra*, n. 22; Shafer *v.* Trust Co., 82 W. Va. 618, 97 S. E. 290 (1918); Knotts *v.* McGregor, 47 W. Va. 566, 35 S. E. 899 (1901).
69 Shires *v.* Boggess, 72 W. Va. 109, 77 S. E. 542 (1913).
70 Clarke *v.* Ohio River Ry., *supra*, n. 60.
71 Snyder *v.* Harper, 24 W. Va. 206 (1884).
72 Hurt *v.* Jones, 75 Va. 34, 353 (1881).

justice, unembarrassed and unimpeded by technical niceties and meticulous refinements, may be readily afforded.'"[73]

Amendment for Misnomer.—Under the statute a misnomer may be cured by amending the declaration and summons, on motion of either party, and on the affidavit of the right name.[74] And the rule applies both to natural persons and corporations alike.[75] It is not necessary to aver that a corporation is such, but if the defect could be treated as a misnomer, the writ could be amended upon mere motion and affidavit of the right name.[76]

Amending Scire Facias.—A *scire facias* is a writ, and should be attested and signed by the clerk of the court from which it issues.[77] But it is also considered an original action in some instances,[78] as when brought to enforce the collection of a recognizance, when it is also considered as both a writ and a declaration, and as such may be amended.[79]

As to Attachments.—The remedy by attachment is purely statutory, and will be confined to the limits prescribed by the statute, and is subject to strict construction.[80]

While the statute, Code chapter 106, section 1 gives the right to file a supplemental affidavit, stating facts which may have come to affiant's knowledge since the filing of the original affidavit, within ten days from the time objection is made to the sufficiency of the facts in the original affidavit, yet, such original affidavit cannot be amended except as to mere clerical defects.[81] A mistake in the date of the affidavit, is a clerical error, and may be amended.[82] Where the affidavit is in fact made and sworn to, the accidental

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73 Watson *v.* Brunner, 128 Va. 600, 606, 105 S. E. 97 (1920).

74 CODE, ch. 125, 14.

75 First National Bank *v.* Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792 (1895).

76 Snyder *v.* Philadelphia Co., 54 W. Va. 149, 46 S. E. 366 (1904); see Hoffman *v.* Dickenson, 31 W. Va. 142, 6 S. E. 53 (1888); Corrick *v.* W. M. Ry. Co., 79 W. Va. 592, 91 S. E. 458 (1917)

77 Pendleton *v.* Smith, 1 W. Va. 16, 24 (1864); Noell *v.* Noell, 93 Va. 433, 25 S. E. 242 (1896); Laidley *v.* Bright, 17 W. Va. 779, 791 (1881).

78 State *v.* Boner, 57 W. Va. 83, 49 S. E. 944 (1906).

79 State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930 (1898); State *v.* Haynes, 77 W. Va. 190, 87 S. E. 73 (1915); State *v.* Haynes, 77 W. Va. 190, 87 S. E. 73 (1915); State *v.* Boner, *supra*, n. 78; Crim *v.* Rhinehart, 64 W. Va. 141, 143, 63 S. E. 212 (1908); Gedney *v.* Com., 14 Gratt. 318, 324 (1858); State *v.* Smith, 98 W. Va. 621, 127 S. E. 495 (1925).

80 Delaplane *v.* Armstrong, 21 W. Va. 211 (1882); Cosner's Admr. *v.* Smith, 36 W. Va. 788, 15 S. E. 977 (1892); Altimeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409 (1893); 1 SHINN. ATT. §8.

81 Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787 (1897); 1 SHINN. ATT. §152.

82 Anderson *v.* Kanawha Coal Co., 12 W. Va. 526 (1878).

omission of the clerk, before which it is made, to sign at the time, is a clerical error, and the signing thereafter is sufficient.[83]

While a court may, at any time, without statutory authority, through its inherent power, allow merely clerical errors and omissions of its officers to be corrected or amended,[84] yet an affidavit which fails to state sufficiently, the nature of the plaintiff's claim, is fatally defective and cannot be amended. Thus, an affidavit for an attachment, saying the plaintiff is about to institute a suit in equity against the defendants, "for the recovery of a claim and debt arising out of contract, upon and by the terms of which there is justly due the plaintiff", (naming him), from the defendants (naming them) "as affiant verily believes, at least the sum of eight hundred and nine dollars", is fatally defective for failure to state sufficiently the nature of the plaintiff's claim.[85] And an affidavit that omitted the word, "justly" from the clause, "justly entitled" to recover was held bad; and an affidavit which said that affiant believes that the plaintiff "should recover" instead of "entitled to recover" was held bad.[86] But an order of attachment, not signed by the clerk, is not void, but only voidable, and may be amended.[87]

And it has been held that an affidavit for an attachment upon any of the grounds prescribed by section 1 of chapter 106 of the Code, except the first, which fails to make any statement of the material facts relied upon, to show the existence of the grounds for the attachment, is void, and cannot subsequently be amended by the filing of another affidavit, purporting to state such material facts.[88] The statute requires that the affiant shall state the material facts relied on by him to show the existence of the grounds upon which his application for an attachment is based, except as to the first ground.[89] The mere statement of one of the grounds prescribed for an attachment, without alleging facts, amount to no more than a conclusion which may be founded upon facts known to the affiant, but not set forth in the affidavit, and numerous decisions declare the insufficiency of a mere claim by way of conclusion.[90]

It has been held that an affidavit for an attachment in a jus-

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83 Farmers Bank *v.* Gettinger, 4 W. Va. 305 (1870).
84 Miller *v.* Zeigler, 44 W. Va. 484, 29 S. E. 981 (1898).
85 Millar *v.* Whittington, 77 W. Va. 142, 87 S. E. 164 (1915); Sommers v. Allen, *supra*, n. 81.
86 Sommers *v.* Allen, *supra*, n. 81.
87 Miller *v.* Zeigler, *supra*, n. 84.
88 Hatfield *v.* Blount, 86 W. Va. 411, 103 S. E. 203 (1920).
89 CODE, ch. 106, §1.
90 Millar *v.* Whittington, *supra*, n. 85.

tice's court cannot be supplemented by a subsequent affidavit or proof, because the statute makes no provision for a supplemental affidavit in an attachment sued out before a justice.[91]

But where the original affidavit for an attachment sets out some grounds or facts showing the nature of plaintiff's claim, or upon which his application for the attachment is based, it has been held that the provisions of section 1, chapter 106 of the Code allowing time to file supplemental affidavits or other material facts to show grounds of attachment, is remedial and should be liberally construed. It should be applied with the same liberality as the law of pleading.[92] And by virtue of the statute, a supplemental affidavit shall be taken as a portion of the original, and operates from the first.[93]

Mandamus.—While a mandamus is a writ of the court, it is also considered as a pleading—the declaration or complaint in the case—and the rules relating to the amendments of pleading are applicable to mandamus.[94] The alternative writ may be amended so as to conform to the mandate of the peremptory writ awarded, and in such case, if the alternative writ be amended after service, it need not be reserved in its amended form.[95] But inasmuch as the petition is no part of the writ of mandamus, the amendment of the petition with leave of the court, does not amend the writ, and such amendatory matter cannot be considered on a demurrer to the alternative writ.[96] Of course, a clerical error in the date of the issuance of a *mandamus nisi* may be cured by amendment[97] and as a *mandamus nisi* answers the two-fold purpose of process and a declaration, it may be amended like a declaration, and even if amended after service, as above stated, it need not be then served again in its amended form.[98]

To Correct a Variance as to Proof.—By the statute, Code chapter 131, section 8, if at the trial of any action there appears to be

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91 CODE, ch. 50, §193; U. S. Baking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. 382 (1893).

92 Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528 (1896); Crim *v.* Harmon, 38 W. Va. 604, 18 S. E. 753 (1893).

93 CODE, ch. 106, §1; Goodman *v.* Henry, supra, n. 92.

94 State *v.* White Oak Ry. Co., 65 W. Va. 15, 64 S. E. 630 (1909); Foster *v.* County Court, 95 W. Va. 514, 121 S. E. 571 (1923); Fisher *v.* City of Charleston, 17 W. Va. 595 (1881); Aultman *v.* Ice, 75 W. Va. 476, 478, 84 S. E. 181 (1915).

95 State *v.* R. R. Co., 65 W. Va. 15, 64 S. E. 630 (1909); Fisher *v.* Charleston, 17 W. Va. 628 (1881); Town of Mason *v.* R. R. Co., 51 W. Va. 183, 189, 41 S. E. 418 (1902).

96 City of Philippi *v.* Water Co., 99 W. Va. 473, 129 S. E. 465 (1926).

97 Aultman *v.* Ice, *supra*, n. 94.

98 Town of Mason *v.* Railroad Co., *supra*, n. 95; 38 C. J. 904; 18 R. C. L. 351, par. 309; 26 CYC. 468.

a variance between the evidence and the allegations or recitals, the court may, if in its opinion substantial justice will be promoted thereby, allow the pleadings to be amended, and if it be made to appear that a continuance of the cause is thereby rendered necessary, such continuance shall be granted at the costs of the party making the amendment. And it has been stated that an amendment to the declaration to conform to the plaintiff's evidence gives the defendant no just cause of complaint if he is afforded full opportunity to introduce testimony bearing upon the subject of the amendment.[99]

Under the above statute, where on a trial objections are timely made to the introduction of evidence on the ground of variance, or the question of such variance is seasonably presented, the pleader should not be permitted to amend his declaration or other pleading *after verdict.* The proper way to take advantage of a variance between the *allegata* and *probata* is not after verdict, working a surprise and injury to the other party, but object to the evidence when first offered to strike out, so that the pleader if he desires, may exercise his right of timely amendment, given by state.[101]

When Amendments can be Made—It is generally stated that an amendment to the pleadings can be made at any time during the trial and before verdict.[102] And in an early case the court refused to allow an amendment to the declaration so as to correct a variance after verdict to correspond with the evidence and verdict found, but set aside the verdict and granted a new trial, with leave to amend.[103] In equity, great delay, without excuse, bars the right to amend.[104]

A variance between the writ and the declaration may be amended at any time before judgment, if substantial justice may be done thereby.[105]

And, a variance between the pleadings and the proof may be

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[99] Skaling *v.* Sheedy, 101 Conn. 545, 126 Atl. 721, 36 A. L. R. 540 (1924). See, *Re* Carson, 184 Cal. 437, 194 Pac. 5, 17 A. L. R. 239 (1920); 21 R. C. L. 577, par. 130.

[100] Long *v.* Collieries Co., 83 W. Va. 380, 98 S. E. 289 (1918).

[101] *Idem.* 384.

[102] Shires *v.* Boggess, *supra,* n. 69; Travis *v.* Ins. Co., 28 W. Va. 583 (1886); Tabbs *v.* Gregory, 4 Call (Va.) 225 (1792).

[103] Tomlinson *v.* Blacksmith, 7 Term. Rep. 132, 7 D. & E., 101 Eng. Rep. Repr. 894 (1797).

[104] Johnson Milling Co. *v.* Read, 76 W. Va. 557, 85 S. E. 726 (1915).

[105] Courson *v.* Parker, 39 W. Va. 521, 20 S. E. 583 (1894); Roberts *v.* Toney, 100 W. Va. 688, 131 S. E. 552 (1926).

corrected by amendment, at any time before verdict.[106] But to take advantage of such variance, the defendant must take timely objection, and not wait until after the verdict, or the objection will then come too late, and will be waived. Such objection should not be general, but specifically set forth the grounds of objection.[107]

Effect of an Amendment.—The amendment relates back to the original pleading, and will have the same effect as if it had been originally filed in the amended form at the commencement of the suit, even as respects the running of the statute of limitations.[108]

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[106] Lawson *v.* Williamson Coal & Coke Co., 61 W. Va. 669, 57 S. E. 258 (1907); Elkhorn Sand & Supply Co. *v.* Algonquin Coal Co., *supra*, n. 60; Adams *v.* Adams, 79 W. Va. 546, 92 S. E. 463 (1917).

[107] Taliaferro *v.* Shepherd, 107 Va. 56, 57 S. E. 585 (1907); Long *v.* Collieries Co., *supra*, n. 100.

[108] Kuhn *v.* Brownfield, 34 W. Va. 252, 12 S. E. 519 (1890); Lamb *v.* Cecil, 28 W. Va. 653 (1886); Shires *v.* Boggess, *supra*, n. 69.